BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of	)	
	)	
Amendment of Section 2.106 of the	)	
Commission's Rules to Allocate	)	ET Docket No. 92-28
Spectrum to the Mobile-Satellite	)	
Service above 1 GHz for	)	PP-29
Low-Earth Orbit Satellites --	)	PP-30
Requests for Pioneer's Preference by	)	PP-31
Constellation, Ellipsat, Loral,	)	PP-32
Motorola, and TRW.	)	PP-33

To: The Commission

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MAY - 5 1992

Federal Communications Commission
Office of the Secretary

MOTION FOR STAY

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TABLE OF CONTENTS

SUMMARY

TRW Inc. hereby moves the Commission to stay all action on the pioneer's preference requests consolidated into ET Docket 92-28 pending the final resolution of the issues now before the Commission on further reconsideration in GEN Docket No. 90-217. The Commission should, however, proceed expeditiously with the release of a notice of proposed rule making in response to the pending proposals for the expanded use of the 1610-1626.5 MHz and 2483.5-2500 MHz bands.

As fully shown herein, grant of the instant motion is warranted under governing standards for administrative stays. First, TRW has very strong likelihood of prevailing on the merits of its Petition For Further Reconsideration in the Pioneer's Preference proceeding. TRW showed there that the Commission erred in its determination that the pioneer's preference procedure is consistent with applicable precedent.

Second, non-"preferenced" parties in the instant proceeding will be irreparably harmed should the Commission prematurely grant a pioneer's preference. Such a premature grant would result in the denial of the parties' rights to meaningful comparative consideration -- rights guaranteed by the Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker") -- and cause substantial prejudice to the establishment and perhaps economic viability of their proposed

services due to significant delay that would be entailed in enforcement of those rights.

Third, postponement of action will not deprive any party of an opportunity for full consideration of its proposal. Indeed, all parties will have their proposals considered on the merits in a more timely fashion.

Finally, grant of the motion would serve the public interest by ensuring compliance with the Communications Act, including avoidance of the unlawful denial of the Ashbacker rights of all non-"preferenced" parties; conservation of scarce Commission resources; and development of a complete record at the earliest possible time resulting in the prompt institution of service to the public.

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To: The Commission

MOTION FOR STAY

TRW Inc. ("TRW"), by its attorneys and pursuant to Sections 1.44(e) and 1.429(k) of the Commission's Rules, hereby respectfully requests the Commission to stay action on the above-captioned pioneer's preference requests until there has been a final resolution of the issues raised in its pending petition for further reconsideration in GEN Docket No. 90-217, the rule making proceeding to establish a pioneer's preference ("Docket 90-217"). See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) ("Pioneer's Preference Order"), recon. in part, 7 FCC Rcd 1808 (1992) ("Pioneer's Preference

Recon. Order"), recon. pending.[1/] In the interim, however, the Commission should continue to process the rulemaking petitions associated with the pending pioneer's preference requests, and issue a notice of proposed rulemaking that is unfettered by pioneer's preference considerations. In support whereof, the following is shown.

I. Introduction

TRW is an applicant, along with Motorola Satellite Communications, Inc. ("Motorola"), Constellation Communications, Inc. ("Constellation"), Ellipsat Corporation ("Ellipsat"), and Loral Qualcomm Satellite Systems, Inc. ("LQSS"), for authorization to provide both radiodetermination satellite service ("RDSS") and mobile satellite services ("MSS") in the 1610-1626.5 MHz and 2483.5-2500 MHz bands (the "RDSS bands").[2/] All five of these applicants have filed

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1/ The Commission should also stay action on the pioneer's preference request of CELSAT, Inc. ("CELSAT") in PP-28, to the extent that CELSAT's rulemaking proposal and pioneer's preference request specify the RDSS bands (as defined below). TRW is, contemporaneously with this motion, filing a substantively similar request for stay in PP-28. In addition, if the Commission does not grant TRW's April 23, 1992 motion to strike the Supplement filed April 10, 1992 by Motorola Satellite Communications, Inc. in PP-32, but instead treats the Supplement as an "additional" pioneer's preference request under Section 1.402(c) of its rules, the Commission should also stay action on the Supplement for the reasons stated herein.

2/ AMSC Subsidiary Corporation ("AMSC") is also an applicant for these frequency bands. AMSC, however, seeks to use the RDSS spectrum to expand its long proposed geostationary mobile satellite service system, and has not sought a pioneer's preference.

requests for pioneer's preferences under Section 1.402 of the Commission's Rules. See Pioneer's Preference Order, supra; Pioneer's Preference Recon. Order, supra; 47 C.F.R. § 1.402. Each of the parties' applications was filed (and in Motorola's and Ellipsat's cases, was accepted for filing) well before July 30, 1991 -- the effective date of the pioneer's preference rule. However, each associated pioneer's preference request was submitted just prior to or after July 30, 1991. See Public Notice, Requests for Pioneer's Preference Filed (released March 9, 1992).

TRW also is a party to the proceedings in Docket 90-217. On April 6, 1992, TRW filed a Petition For Further Reconsideration ("Petition") in response to the Pioneer's Preference Recon. Order. In the Pioneer's Preference Recon. Order, among other things, the Commission declined to modify the nature of the pioneer's preference, so as to render it a comparative rather than a dispositive factor. Pioneer's Preference Recon. Order, 7 FCC Rcd at 1809. The Commission also established a deadline for filing pioneer's preference requests that would occur shortly before adoption of a notice of proposed rule making in which the agency would consider a rule change to permit the service proposed by the party requesting a pioneer's preference. Id. at 1812.

In the Petition, TRW has requested the Commission to reconsider these two actions, particularly in light of their

combined effect. As fully demonstrated in the Petition,[3/] where two or more mutually exclusive applications have been filed prior to submission of pioneer's preference requests (as in this proceeding), treatment of the pioneer's preference as a dispositive factor imposes a new threshold application criterion, thereby depriving non-"preferenced" applicants of the meaningful comparative consideration dictated by the Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker"). See Petition at 5-12.

As fully demonstrated in Section II below, the instant motion complies with the criteria for grant of the requested stay. First, TRW's strong showing in the Petition of Commission error under applicable precedent -- including the concrete adverse consequences to non-"preferenced" applicants resulting from such error -- renders TRW likely ultimately to prevail on the merits of the Petition. Second, TRW seeks to avoid the irreparable harm to non-"preferenced" parties of the loss of their Ashbacker rights by the premature grant, before final resolution of the issues outstanding in Docket 90-217, of a pioneer's preference in this proceeding. Proper application of the pioneer's preference rule to the five pending requests is directly dependent upon such final resolution. Third, grant will not harm any interested party, as all parties will have an opportunity for full consideration

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3/ TRW hereby incorporates the Petition herein by reference. For the Commission's convenience, a copy of the Petition is attached hereto.

of the merits of their respective applications, including their pioneer's preference requests. Finally, grant will serve the public interest by implementing the pioneer's preference rule in full compliance with the Communications Act and applicable case law precedent; by conserving the scarce Commission resources that would be unnecessarily expended in the event of a premature grant of a pioneer's preference; and by developing a complete record at the earliest possible time, resulting in the prompt institution of service to the public.

II. Grant of The Stay Requested Herein Is Clearly Warranted Under Governing Precedent

It is well settled that the following factors must be considered in an agency's consideration of a motion for stay:

> (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the agency grants the stay; and (4) the public interest in granting the stay.

Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). In Cuomo, the court made clear that the test is a flexible one, stating:

> To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay

> may be granted with either a high probability of success and some injury, or vice versa.

Id. See also Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). As shown below, the instant motion satisfies the foregoing four-fold test.

A. TRW Is Likely Ultimately To Prevail On The Merits Of Its Petition For Further Reconsideration Of The Pioneer's Preference Recon. Order.

In its Petition in Docket 90-217, TRW showed that inasmuch as the Commission will rely on its decisions in the Pioneer's Preference proceeding to award dispositive preferences that will guarantee licenses to mutually exclusive applicants (and therefore lead to the summary rejection of other applications), the Commission's decisions are contrary to the Supreme Court's decision in Ashbacker. It observed that in the Pioneer's Preference Order, the Commission made only a brief mention of Ashbacker, summarily concluding that it has authority to establish the pioneer's preference as a threshold application criterion. TRW also noted that while the Commission's Pioneer's Preference Recon. Order contained no direct discussion of Ashbacker, the Commission nevertheless took several actions which undercut that doctrine. Petition at 5-7.

On the whole, TRW used its Petition to demonstrate that the irreparable adverse impact that the pioneer's preference procedure would have on parties' Ashbacker rights

should lead the Commission to reconsider its entire pioneer's preference determination. Id. at 7-12. Not only do the cases cited by the Commission in its limited Ashbacker analysis fail to support the Commission's determination on this critical issue, they actually provide strong support for the conclusion that the pioneer's preference procedures are inconsistent with Ashbacker -- at least in circumstances where, as here, mutually exclusive applications are filed prior to or contemporaneously with requests for pioneer's preferences. Id. at 12-16.

Therefore, in light of TRW's strong showing of Commission error under applicable precedent, including the concrete adverse consequences to non-"preferenced" applicants resulting from Commission actions that are inconsistent with such precedent, TRW is likely ultimately to prevail on the merits of the Petition.

B. Grant Of A Dispositive Pioneer's Preference To Any Of The Mutually Exclusive Applicants In This Proceeding Will Irreparably Harm The Remaining Applicants.

As fully demonstrated in the Petition, grant of a dispositive pioneer's preference to any mutually exclusive application in this proceeding would deprive one or more of the remaining non-"preferenced" applicants of their Ashbacker rights to meaningful comparative consideration with such a "preferenced" applicant. Thus, proper application of the pioneer's preference to the five pending requests is dependent

upon a final resolution of the issues outstanding in Docket 90-217.

Under the combined effect of the Commission's actions in Docket 90-217, grant of a dispositive pioneer's preference in this proceeding would create a new threshold application criterion -- "innovativeness" -- after the parties have filed applications that comply with all threshold requirements known at the time the applications were filed. As the result of even a tentative award of a preference in ET Docket No. 92-28, the focus of the parties and the Commission would necessarily stray from issues designed to assist the Commission in determining which service proposal or regulatory regime would be most consistent with the public interest and Commission policies and statutory requirements. Instead the focus would be placed on determining whether the proposed pioneer was entitled to a dispositive preference. Similarly, a "comparative hearing" in which one mutually exclusive applicant had been granted a pioneer's preference would focus upon the "innovativeness" of the "preferenced" applicant's proposal, rather than on the development of a full and complete record comparing the relative merits of all applications under existing Commission policies implementing the public interest standard, as required by the Communications Act.

In other words, if a preference is awarded to any of the parties in ET Docket No. 92-28, the Commission would not conduct meaningful comparative consideration of those competing

rulemaking or service proposals which may possess superior technical and commercial merit, but lack "innovativeness." Thus, these non-"preferenced" proposals would not receive full consideration as required by the Communications Act, and as developed in Ashbacker and its progeny.

The irreparable nature of the harm to non-"preferenced" applicants of such a denial of their Ashbacker rights to meaningful comparative consideration is starkly illustrated in the instant proceeding, in which all of the applicants are proposing to provide global service. Grant of a pioneer's preference -- with its guarantee of a license -- to a mutually exclusive applicant would entirely preclude at least one of the remaining applicants from providing any service whatsoever throughout the world.4/

Furthermore, the irreparable harm caused by the denial of applicants' Ashbacker rights is not merely theoretical. The inevitable effect of such a denial of rights would be the substantial delay inherent in the seeking of administrative and judicial review of the Commission's action. Following such review, the Commission would be required to provide non-"preferenced" applicants the meaningful consideration mandated by Ashbacker and to develop a complete record.

4/ The Commission has stated that it will not grant a pioneer's preference that would result in a nationwide monopoly and thereby exclude others from providing that service. Pioneer's Preference Recon. Order, 7 FCC Rcd at 1808. Thus, this motion is consistent with established Commission policy.

In the meantime, several proposed international RDSS and MSS systems, which are not subject to the Commission's rulemaking and licensing processes, would continue to be developed and would likely commence operating. This would reduce the potential customer base for TRW and the other systems proposed by U.S. applicants, severely impair the economic viability of the applicants' proposed services, and increase substantially the obstacles which such systems must overcome in order successfully to satisfy their coordination obligations under the International Telecommunication Union procedures.[5/]

These prejudicial effects can be avoided only by postponing a decision on the pioneer's preference requests pending in this proceeding until a final resolution of the issues raised in Docket 90-217 has occurred. In order for the Commission to maximize the potential for the service it is to establish in ET Docket No. 92-28, it must avoid any action that hinders the expeditious development of a complete record on the relative merits of the various rulemaking proposals, and proceed to a meaningful comparison of the applicants' basic qualifications and public interest benefits of their proposals.

5/ The Commission has identified the ability promptly to coordinate an international satellite system as a paramount concern in other contexts. See Final Decision in GEN Docket No. 84-1234, 7 FCC Rcd 266 (1992).

C. Grant Will Not Harm Any Other Interested Parties.

Grant of this motion will not harm any interested parties to this proceeding. Postponement of action on the pioneer's preference requests pending resolution of the vitally important issues outstanding in Docket 90-217 will benefit the public and all parties by allowing the Commission to engage in an analysis that is based entirely on the objective merits of each of the pending rulemaking proposals, and that does not digress to the collateral issue of the subjective "innovativeness" of one or more of the proposals. Postponement of such a decision also would avoid the unnecessary development of the record in this proceeding in separate phases and the substantial delay inherent in the review process which would be undertaken to protect non-"preferenced" applicants' Ashbacker rights, as described in Section II B. above.

In short, grant of the stay requested here will not deny any party an opportunity for full consideration of the respective merits of its proposed system or -- at an appropriate time -- its request for pioneer's preference. Indeed, as discussed above, a grant of the relief requested herein is critically important to ensuring that the proposals of all parties are given meaningful consideration on their merits.

D. Grant Will Serve The Public Interest.

The public interest will be served by the application of a pioneer's preference rule that fully complies with the Communications Act, as developed in governing case law precedent. Such an application of the rules cannot occur until a final resolution has been reached concerning the issues pending on further reconsideration in Docket 90-217.

In addition, the public interest is served by the conservation of scarce Commission resources. The grant of a preference now would, as explained above, artificially skew the record of the proceeding by focusing upon a "preferenced" applicant's "innovativeness." The Commission will have to reopen and complete the record with full consideration of the merits of mutually exclusive non-"preferenced" proposals at a later date, after it or the court of appeals determines that the Ashbacker rights of these parties have been impermissibly abridged.

Of course, the public interest is also served by the development of a full and complete record at the earliest possible time. Action on the rulemaking proposals and underlying applications should proceed during the stay, and result in the promptest possible institution of service to the public.

III. Conclusion

For the foregoing reasons, TRW urges the Commission to refrain from acting on the pioneer's preference requests in this proceeding until the issues outstanding in Docket 90-217 have been finally resolved. The proper application of the pioneer's preference to the five pending requests herein is directly dependent upon the ultimate resolution of the issues raised in Docket 90-217. Therefore, TRW respectfully requests the Commission to grant this motion.

Respectfully submitted,

TRW Inc.

By: _____

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ATTACHMENT

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In the Matter of	)	
	)	
Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services	)	GEN Docket No. 90-217

To: The Commission

PETITION FOR FURTHER RECONSIDERATION

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April 6, 1992

TABLE OF CONTENTS

SUMMARY

In this Petition for Further Reconsideration, TRW urges the Commission to conclude that its decisions in GEN Docket No. 90-217, insofar as they will guarantee licenses to mutually exclusive applicants without subjecting those applicants to competing applications, are violative of the Supreme Court's decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker"). The Commission has failed to explain how the Ashbacker Court's requirement that all bona fide competing applications be given comparative consideration will be satisfied in cases where mutually exclusive applications are pending at the time of the award of a pioneer's preference to one applicant, and the case law clearly fails to support the Commission's conclusion.

In its report and order in the Pioneer's Preference proceeding, the Commission conducted only a limited analysis of the consistency of its action with the Supreme Court's decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). It did little more than conclude that it possessed the authority to impose threshold eligibility criteria on applicants, even if those criteria limit the "class of eligibles" to one applicant.

In its decision on reconsideration, the Commission did not specifically address Ashbacker issues. However, it rejected a request to have the pioneer's preference become a comparative criterion rather than a guarantee of license, it

refused to articulate objective standards for ascertaining an applicant's entitlement to a preference, and it imposed a deadline for submission of pioneer's preference requests that will typically fall after underlying service applications have been tendered and accepted for filing.

The Commission's decision not to recharacterize the pioneer's preference as a comparative (rather than determinative) factor, combined with its establishment of a filing deadline for pioneer's preference requests that falls well after service applications have been accepted for filing, violates the right of any service applicant not receiving a preference to meaningful comparative consideration with a mutually exclusive applicant that does receive a preference. In such a proceeding, the focus of the comparison is centered on the innovativeness of the "pioneer's" proposal, rather than on objective criteria that were known to all of the applicants before they submitted their applications.

This elevation of a factor that was not known at the time of filing to a determinative factor in the comparison of mutually exclusive proposals is neither explained by the Commission in its decisions in the Pioneer's Preference proceeding nor supported by the cases cited by the Commission. The Commission should reconsider this key aspect of its decision in Pioneer's Preference before any applicant's rights to complete and meaningful comparative consideration are abrogated.

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To: The Commission

PETITION FOR FURTHER RECONSIDERATION

TRW Inc. ("TRW"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby petitions the Commission to reconsider further its decision in Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) ("Pioneer's Preference Order"), recon. in part, FCC 92-57 (released February 26, 1992) ("Pioneer's Preference Recon. Order").[1/] For the reasons stated below, TRW urges the Commission to conclude that the pioneer's preference procedures are violative of the decision of the United States Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker"), and its progeny.[2/]

1/ The Pioneer's Preference Recon. Order was published in the Federal Register on March 5, 1992. See 58 Fed. Reg. 7879 (March 5, 1992).

2/ TRW previously participated in this proceeding. It filed an opposition to the petition of Ellipsat Corporation for reconsideration of the Pioneer's Preference Order.

I. Introduction

The Commission's pioneer's preference rule, which is now codified principally at 47 C.F.R. § 1.402, is intended by the Commission "to provide preferential treatment in the Commission's licensing processes for parties requesting spectrum allocation rule changes associated with the development of new communications services and technologies." Pioneer's Preference Recon. Order, FCC 92-57, slip op. at ¶ 2 (footnote omitted). The Commission stated that "a party granted such a preference is effectively guaranteed a license because it is permitted to file a license application without being subject to competing applications." Id.[3/]

In its Pioneer's Preference Order, the Commission concluded that it possessed the authority to award what it termed a "dispositive preference." Pioneer's Preference Order, 6 FCC Rcd at 3492. In its limited explanation of how it arrived at this assessment of its authority, the Commission recognized that the Supreme Court's decision in Ashbacker made

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3/ In order to receive a pioneer's preference, a party must demonstrate that it has developed an innovative proposal that leads to the establishment of a communications service not currently provided or a substantial enhancement to an existing service. The Commission "indicated that a qualifying innovation could be an added functionality, a use of the spectrum different than previously available, or a change in the operating or technical characteristics of a service." Pioneer's Preference Recon. Order, FCC 92-57, slip op. at ¶ 3.

clear that the Communications Act requires that all bona fide competing applications are entitled to comparative consideration. Id.[4/] The Commission went on to recite, however, that "the Supreme Court has indicated that when adequately supported by the record in a rule making proceeding, the Commission may establish threshold standards that applicants must satisfy before they are entitled to be eligible for comparative consideration." Id. (citing United States v. Storer Broadcasting Co., 351 U.S. 192, 202-05 (1956); Public Utilities Commission of California v. FERC, 900 F.2d 269 (D.C. Cir. 1990); Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989)). No further discussion of the Ashbacker doctrine was presented.

In its Pioneer's Preference Recon. Order, the Commission did not elaborate on its Ashbacker determination or provide any additional explanation of the new rule's effect on the requirement that bona fide competing applications be given comparative consideration. However, the Commission made two determinations that have a profound impact on that requirement. First, the Commission refused the request of the

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4/ Actually, the Commission ratified a similar assessment of Ashbacker that was contained in the notice of proposed rule making that preceded the Pioneer's Preference Order. See Pioneer's Preference Order, 6 FCC Rcd at 3492 (referring to discussion in Notice of Proposed Rule Making in Gen. Docket 90-217, 5 FCC Rcd 2766, 2767 (¶ 9)).